Palais v McLaughlin

2024 NY Slip Op 35116(U)

October 17, 2024

Supreme Court, Westchester County

Docket Number: Index No. 65367/2021

Judge: Thomas Quiñones

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

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Lorraine Palais,

Plaintiff(s)

-against-

Edward McLaughlin, Jr., AA Tree Service, Inc., and Alex Moran,

Defendant(s).

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DECISION AND ORDER
Index No. 63567/2021
Motion Sequence No. 3

The following papers filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 47-60 were read and considered on the motion filed by Defendant Edward McLaughlin, Jr. for a court order pursuant to CPLR §3212 granting summary judgment in favor of the movant or, in the alternative, for sanctions on Plaintiff pursuant to CPLR §3126 for spoliation of evidence, and any other relief deemed just and proper.

Upon the foregoing papers, the motion is determined as follows:

Plaintiff commenced this action by filing pleadings on September 25, 2021. It is alleged that on May 25, 2019, the Defendant Edward McLaughlin, Jr., as an adjacent land owner to Plaintiff's property, caused the co-defendants (AA Tree Service, Inc., and Alex Moran) to enter Plaintiff's property without Plaintiff's consent. It is alleged that, upon entry, Defendants "destroyed, cut, injured and/or removed a mature tree" located on the Plaintiff's property "causing permanent and substantial property damage." (Complaint ¶8). Plaintiff alleges that the "Defendants are liable for violating RPAPL § 861, trespassing on the [Plaintiff] Palais Property, converting property of the Plaintiff, and for negligently causing property damage to the [Plaintiff] Palais Property." (Complaint ¶9).

Defendant Edward McLaughlin, Jr. interposed an Answer on December 22, 2021 (NYSCEF Doc. 3). Defendants AA Tree Service, Inc. and Alex Moran did not interpose an answer or otherwise appear in this action. By Decision and Order dated December 13, 2022 [Hon. Zuckerman, J.S.C.], the Court granted Plaintiff's motion for a default judgment against Defendant AA Tree Service, Inc. and reserved judgment as to the amount of damages to be "determined at an inquest to be held upon application to the trial court at the time of trial of the instant action" or, if no such trial occurs, then Plaintiff shall file a Note of Issue for inquest as therein stated (NYSCEF Doc. 23 at pg. 5).

As it relates to discovery, a Preliminary Conference Order setting forth the discovery deadlines was filed on June 16, 2022 (NYSCEF Doc. 8), compliance conferences were held to monitor the progression of discovery, discovery was certified as complete by Trial Readiness Order filed on May 16, 2024 (NYSCEF Doc. 44), after which Plaintiff filed a Notice of Issue on June 3, 2024 (NYSCEF Doc. 44). Accordingly, this matter is ripe for dispositive motions.

Defendant McLaughlin's Motion:

Defendant Edward McLaughlin, Jr. filed the instant motion for a court order pursuant to CPLR §3212 granting summary judgment in favor of the McLaughlin or, in the alternative, for sanctions on Plaintiff pursuant to CPLR §3126 for spoliation of evidence and/or any other relief deemed just and proper. Counsel contends that co-defendant AA Tree Service, Inc. was an independent contractor failed to follow McLaughlin's instruction not to go onto Plaintiff's property. McLaughlin argues that he is not responsible for the acts of the independent contractor which were contrary to his instructions not to go onto Plaintiff's property. Therefore, the trespass case against McLaughlin warrants dismissal. Counsel further contends that McLaughlin was within his legal right to "self-help" in instructing AA Tree Service, Inc. to cut down the portions of Plaintiff's tree/tree branch which "overhung" (or encroached) onto McLaughlin's property. McLaughlin stated that such tree branch spanned approximately 20 feet in length and extended over his driveway, nearly touching his house. McLaughlin stated that he even contacted City Hall about the tree branch issue and was informed that he could trim the tree up to the fence i.e., the property line. Accordingly, McLaughlin requests a court order pursuant to CPLR §3212 granting summary judgment in his favor.

Alternatively, McLaughlin requests a court order for the imposition of sanctions pursuant to CPLR §3126 for spoliation of evidence. In that regard, counsel contends that Plaintiff presented testimony that Plaintiff, responding police officers, and Plaintiff's prior attorney reviewed surveillance video, yet such surveillance video was not preserved and is no longer available. As to its purported content, Brandon Neider, the Plaintiff's grandson referred to in motion papers as "Brandon", testified that the video depicted AA Tree Service, Inc. arriving at the scene and entering Plaintiff's property, but did not depict the backyard area or the actual tree cutting.

Plaintiff's Opposition:

Plaintiff filed opposition to Defendant's motion. First, counsel contends that there are disputed material issues of fact that preclude summary judgment. Counsel states that the Defendant's motion argument that McLaughlin is not vicariously liable for the acts of AA Tree Service, Inc. both misapprehends the causes of action against him and misinterprets the underlying rule of law on vicarious liability. In that regard, counsel argues that AA Tree Service, Inc. deliberately trespassed in order to avoid the extra time, effort, risk, and expense of trimming the tree at height, and the lack of supervision which might have prevented same constitutes Defendant McLaughlin's negligence,

not the negligence of his contractor (AA Tree Service, Inc.). Counsel also states that McLaughlin's contention that he directed AA Tree Service, Inc. not to trespass is in dispute. Moreover, even if McLaughlin so instructed AA Tree Service, Inc., Plaintiff's counsel contends that there exists a related but additional disputed issue of material fact as to whether AA Tree Service, Inc. could have completed the work that Defendant contracted for without crossing the fence line onto Plaintiff's property.

Second, counsel contends that Defendant McLaughlin's motion failed to address Plaintiff's first cause of action pursuant to RPAPL §861 ["Action for cutting, removing, injuring or destroying trees or timber, and damaging lands thereon"], and Plaintiff's third cause of action for Conversion. Counsel argues that Defendant's motion misinterprets Plaintiff's fourth cause of action for Negligence and does not develop an undisputed defense for the second cause of action for Trespass. For the foregoing reasons, counsel requests that the Court deny Defendant's motion for summary judgment in its entirety.

Lastly, as to the Defendant's alternate request for spoliation, Plaintiff contends that Defendant's spoliation argument pursuant to CPLR §3126 is premised on a hearsay (NYSCEF Doc. 56, Plaintiff's Counter-Statement of Material Facts ¶14), and is directly refuted by Plaintiff's former counsel, Vincent Volino, who filed an affidavit stating that he "was never in possession of a copy of a surveillance video that captured the alleged trespass" and "did not view any surveillance video that captured the alleged trespass (NYSCEF Doc.58 ¶¶ 3, 4). Counsel proffered another explanation for the lack of preservation of the surveillance video - Plaintiff's grandson, Brandon, had not committed to pursuing a civil action until weeks after the footage had expired (NYSCEF Doc. 57 ¶21, citing NYSCEF Doc. 52 Brandon Neider's EBT transcript at pg. 22). Even assuming arguendo, that Defendant's hearsay is correct, and that Volino did say that he had viewed the footage, Plaintiff's present counsel states that "it is equally plausible that this was a ploy to entice a settlement offer, and thus carries no evidentiary weight." (NYSCEF Doc. 57 ¶21).

Decision:

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions,

expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dept 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]). The court may "draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (*Yelder v Walters*, 64 AD3d 762, 767 [2d Dept 2009]; *Nicklas v Tedlen Realty Corp*., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Here, the motion record, which includes the deposition testimony of the parties and non-party Brandon Neider, the Police Incident Report (narrative section), and prior counsel Vincent Volino's affidavit, amongst other proffered evidence, raises material issues of fact to be resolved by a trier of fact. By way of example, Police Incident Report indicates that Brandon Neider never spoke to McLaughlin about the tree branch removal issue prior to the date of the incident (Brandon Neider EBT p. 13-14), whereas McLaughlin stated that he previously spoke with Brandon Neider about the tree branch issue for over two years prior to hiring a contractor to trim the tree branches (Defendant's EBT pg. 43-44).

The motion record raised further issues of fact and credibility. Specifically, the Police Incident Report, in part, states that "Neider related that he has surveillance cameras on his house but that none of them capture the backyard area where the tree is located. Neider related that he wished this incident to be documented for purposes of civil action that might be taken in the further" (NYSCEF Doc. 60 pg. 5). To the contrary, at his deposition, Brian Neider testified in part that he reviewed video surveillance footage at the subject premises and such "security footage shows them [referencing AA Tree Service, Inc.] entering the property" entering the backyard but does not show them cutting the tree. (NYSCEF Doc. 52, pg. 9 lines 5-14). Neider further testified that the video surveillance system preserves videos for a one-week period, he reviewed the video surveillance within the one-week period but did not copy, backup, or otherwise preserve such footage in any manner to be viewed after the one-week system preservation period expired. (*Id.* at pg.10).

Furthermore, McLaughlin states that he instructed his tree removal contractor, AA Tree Service, Inc., not to enter Plaintiff's property to perform the tree branch removal work. Rather, McLaughlin directed his contractor to perform such work on Defendant's property and cut the tree branch back to Defendant's fence which is a visual indicator of Defendant's property line, as previously discussed with the City (*see*, Defendant's EBT transcript p. 25, 29, 41-45). To the contrary, Plaintiff disputes whether there was a tree branch overhang issue, whether the Defendant

provided such direction to his contractor when such work was performed in Defendant's absence and Plaintiff also raises an issue of fact as to whether the tree branch was able to be cut without crossing the fence line and traversing onto Plaintiff's property. (NYSCEF Doc. 57 p. 2-3).

Accordingly, Defendant's motion for summary judgment pursuant to CPLR 3212 is denied as the motion record before the Court raises material issues of fact and credibility to be resolved by a trier of fact.

Lastly, as it relates the branch of Defendant's motion for spoliation related to Plaintiff's alleged video surveillance of the incident, it is well-settled that "[a] party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that a trier of fact could find that the evidence would support that claim or defense. The Supreme Court is empowered with broad discretion in determining the appropriate sanction for spoliation of evidence" (*Sarris v Fairway Group*, 169 AD3d 734 [2d Dept. 2019], *citing Pegasus Aviation I, Inc. v Varig Logistica, S.A.*, 26 NY3d 543, 547 [2015]; *Lilavois v JP Morgan Chase & Co*., 151 AD3d 711, 712 [2d Dept. 2017]). In *Tanner v Bethpage Union Free School District*, 161 AD3d 1210 [2d Dept. 2018], the Court held that "[i]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices."

In this case, the Court notes that although there was no letter requesting the preservation of the video surveillance, the Police Incident Report narrative states, in part, that Brandon Neider reported to the responding officer his desire to have the video "for purposes of civil action that might be taken in the future," thus contemplating future litigation. (NYSCEF Doc. 60 p. 5). Neider also had knowledge that the video surveillance system only has a one-week preservation period, yet he made no efforts to preserve same. Lastly, Plaintiff's trespass claim is solely reliant upon Brandon Neider's review of such video (and not based upon any eyewitness testimony from anyone who personally visually observed such alleged conduct). As such, the Defendant is unable to have the benefit of reviewing the video and challenging the veracity of Brandon Neider's statements of trespass solely based on his observation of such video. Although defense counsel recognizes that courts sparingly strike pleadings on such grounds, this Court finds that, under the circumstances presented, Defendant is entitled to a negative inference charge at trial.

Based on the foregoing, it is hereby

ORDERED that, the portion of Defendant's motion for summary judgment is DENIED for the reasons herein stated. It is further

ORDERED that, that, as to the portion of Defendant's motion for surveillance video spoliation or alternative relief deemed just by this Court, this Court determines that Defendant is

entitled to a negative inference charge at trial. It is further

ORDERED that, the Judge's Part Clerk will issue a separate court notice scheduling a Pre-Trial Settlement Conference shortly.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 17, 2024
White Plains, New York

E N T E R :

HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*